United States Department of Labor
Employees' Compensation Appeals Board

N.B., Appellant	)	
	)	
and	)	**Docket No. 19-0221**
	)	**Issued: July 15, 2019**
DEPARTMENT OF AGRICULTURE, FOOD SAFETY & INSPECTION SERVICE, OFFICE OF FIELD OPERATIONS, Philadelphia, PA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 8, 2018 appellant, through counsel, filed a timely appeal from a September 21, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish total disability from work commencing October 15, 2017 causally related to her accepted August 9, 2017 employment injuries; and (2) whether appellant has met her burden of proof to establish that acceptance of her claim should be expanded to include left lateral epicondylitis causally related to the accepted August 9, 2017 employment injury.

FACTUAL HISTORY

On August 9, 2017 appellant, then a 40-year-old consumer safety inspector, filed a traumatic injury claim (Form CA-1) alleging on that date that she fell down stairs injuring her left elbow and left leg while in the performance of duty.

On August 9, 2017 appellant sought treatment at the emergency room from Rebecca Broadaway, a physician assistant. On August 20, 2017 the employing establishment provided her with an authorization for examination and/or treatment (Form CA-16). Dr. William Rohan, a Board-certified internist, completed the Form CA-16 on August 29, 2017 and diagnosed left arm pain. He indicated by checking a box marked "yes" that he believed that appellant's diagnosed condition was due to her employment injury. Dr. Rohan found that she was totally disabled from work from August 29 through September 7, 2017.

In a September 7, 2017 note, Dr. Thomas E. Varney, a Board-certified orthopedic surgeon, reported that appellant had fallen down the stairs onto her left elbow on August 9, 2017. He also noted that her work duties had changed such that she was required to repetitively lift carcasses with her left hand to perform inspections. Dr. Varney diagnosed left elbow pain. He opined that appellant's left elbow pain was consistent with lateral epicondylitis. Dr. Varney noted that he was not certain whether her left elbow condition was due to her work duties or to her August 9, 2017 fall. He indicated that appellant could return to work on September 11, 2017 without lifting with her left upper extremity.

On September 8, 2017 Dr. Varney completed a form report and noted that appellant had fallen down stairs while working and diagnosed left elbow pain. He also indicated by checking a box marked "yes" that he believed that her diagnosed condition was due to her employment injury. Dr. Varney also completed a duty status report (Form CA-17) on September 20, 2017 diagnosing left elbow pain and provided appellant's light-duty work restrictions.

In an October 19, 2017 note, Dr. Varney diagnosed lateral epicondylitis of the left elbow. He noted that appellant had stopped work as the employing establishment had not provided light-duty work in accordance with his ongoing restrictions. Dr. Varney also completed a Form CA-17 on October 19, 2017 diagnosing lateral epicondylitis and providing light-duty work restrictions.

Beginning on October 27, 2017 appellant filed claims for compensation for leave without pay (Form CA-7) for the period October 15 through December 19, 2017.[3]

On November 13, 2017 OWCP accepted appellant's claim for left elbow contusion and left elbow abrasion.

By development letter dated November 13, 2017, OWCP noted that when appellant's claim was first received it appeared to be a minor injury that resulted in minimal or no lost time from work. Based on this criteria, it had administratively approved payment of a limited amount of medical expenses. OWCP advised appellant of the deficiencies of her claim. It requested additional factual and medical evidence from her and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

In a separate letter dated November 13, 2017, OWCP notified appellant that her claim for disability compensation was not payable as she had not submitted medical evidence establishing that her disability from work was due to her accepted conditions of left elbow contusion and left elbow abrasion rather than to the nonwork-related left elbow lateral epicondylitis.

In a December 3, 2017 note, the employing establishment reported that there had been no light-duty work available for appellant.

In a December 19, 2017 note, Dr. Varney diagnosed left lateral epicondylitis and found that appellant could return to full-duty work on December 20, 2017. On December 20, 2017 appellant returned to full-time regular duty at the employing establishment.

In a letter dated January 8, 2018, appellant responded to OWCP's November 13, 2017 factual development questionnaire and denied having any similar injury to her left elbow prior to August 9, 2017.

By decision dated January 25, 2018, OWCP denied appellant's claim for left epicondylitis, finding that the medical evidence did not establish causal relationship between her diagnosed condition and her August 9, 2017 employment injury.

By separate decision dated January 25, 2018, OWCP denied appellant's claim for disability for the period October 15 through December 19, 2017 due to her accepted August 9, 2017 employment injuries.

On January 25, 2018 appellant submitted a November 30, 2017 note from Dr. Varney. At that time, Dr. Varney diagnosed lateral epicondylitis left elbow and continued to find that she was partially disabled and to provide work restrictions.

On February 21, 2018 appellant, through counsel, requested an oral hearing, in the form of a telephonic hearing, with an OWCP hearing representative from both of the January 25, 2018 OWCP decisions. In a narrative statement dated July 5, 2018, appellant reported on August 8,

[3] These forms indicated that appellant also worked part time as a supermarket cashier on October 20, 21, 27, and 28, 2017 as well as November 3, 4, 10, 11, 17, and 18, 2017. She also worked in this position on December 1 and 2, 2017.

2017 she fell down the stairs at work landing on her left elbow and both buttocks. She again reported that she was able to work until August 8, 2017 and had not received any previous diagnosis of left lateral epicondylitis.

On July 31, 2018 appellant testified at a telephonic hearing before an OWCP hearing representative. She described the August 9, 2017 employment incident during which she fell down three or four steps at the employing establishment landing on her left elbow. Appellant asserted that she had no left elbow pain prior to her fall on August 9, 2017. She noted that she worked at the employing establishment following the August 9, 2017 fall from August 10 through 21, 2017. Appellant stopped work on August 22, 2017 and returned on December 20, 2017. The employing establishment then transferred her to Nevada.

On August 1, 2018 OWCP accepted the additional condition of contusion of the left thigh as causally related to appellant's August 9, 2017 employment injury. In a letter dated August 14, 2018, it noted that it had initially created two separate files for her August 9, 2017 injuries, but had then transferred all the documents from OWCP File No. xxxxxx300 into the current claim file, OWCP Filed No. xxxxxx432, and deleted the former file.

By decision dated September 21, 2018, OWCP's hearing representative found that appellant had not met her burden of proof to establish that her disability for the period October 15 through December 19, 2017 was causally related to her accepted employment injuries. She further found that appellant had not met her burden of proof to establish left epicondylitis causally related to her accepted August 9, 2017 employment injury.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[5]

Whether a particular injury causes an employee disability from employment and the duration of that disability are medical issues which must resolved by a preponderance of the reliable, probative, and substantial medical evidence.[6] Findings on examination are generally needed to support a physician's opinion that an employee is disabled from work.

Under FECA the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time

[4] *Supra* note 2.

[5] *V.H.*, Docket No. 18-1282 (issued April 2, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *V.H, id.*; *Edward H. Horton*, 41 ECAB 301 (1989).

of injury, has no disability as that term is used in FECA.[7] Furthermore, whether a particular injury causes an employee to be disabled from employment and the duration of that disability are medical issues which must be proven by a preponderance of the reliable, probative, and substantial medical evidence.[8] The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish total disability from work commencing October 15, 2017 causally related to her accepted August 9, 2017 employment injuries.

Following her August 9, 2017 employment injuries of left elbow contusion, left elbow abrasion, and contusion of the left thigh, appellant stopped work on August 22, 2017 and returned to full-duty work on December 20, 2017. She filed claims for compensation for the period October 15 through December 19, 2017.

On August 9, 2017 appellant sought treatment at the emergency room from a physician assistant. Reports from physician assistants have no probative medical value in establishing her claim. Such healthcare providers are not considered "physician[s]" as defined under FECA.[10] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[11]

On August 29, 2017 Dr. Rohan submitted a completed a form report and diagnosed left arm pain. On September 8, 2017 Dr. Varney completed a form report and also diagnosed left elbow pain. The Board has held that the mere diagnosis of "pain" does not constitute the basis for payment of compensation.[12] Without a further diagnosis, these medical reports are insufficient to meet appellant's burden of proof to establish disability from work.

On September 7, 2017 Dr. Varney noted appellant's history of injury on August 9, 2017 and diagnosed left elbow pain consistent with lateral epicondylitis. He found that she was partially disabled. As noted above, left elbow pain is not an acceptable diagnosis to constitute the basis for

[7] *See* 20 C.F.R. § 10.5(f); *V.H., id.*; *N.M.,* Docket No. 18-0939 (issued December 6, 2018).

[8] *V.H., id.*; *Fereidoon Kharabi,* 52 ECAB 291 (2001).

[9] *Id.*

[10] 5 U.S.C. § 8101(2). This subsection defines a physician as surgeons, podiatrist, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law.

[11] *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *see S.Y.*, Docket No. 18-1814 (issued April 18, 2019); *M.F.*, Docket No. 17-1973 (issued December 31, 2018).

[12] *T.G.*, Docket No. 18-1064 (issued April 26, 2019); *Robert Broome*, 55 ECAB 339 (2004).

payment of compensation.[13] Furthermore, the Board notes that lateral epicondylitis had not been accepted as causally related to the August 9, 2017 employment injury. Dr. Varney continued to diagnose lateral epicondylitis in reports dated October 19, November 30, and December 19, 2017. As he failed to offer the necessary rationale for his opinion that appellant was disabled due to her accepted left elbow contusion, left elbow abrasion, and left thigh contusion, his opinions are of limited probative value.[14] These reports do not establish that appellant was disabled from October 15 through December 19, 2017 due to her accepted employment injuries.

As appellant did not submit sufficiently rationalized medical opinion evidence to establish that she was disabled from work for the period commencing October 15, 2017 due to the August 9, 2017 accepted conditions of left elbow contusion, left elbow abrasion, and left thigh contusion, she has not met her burden of proof to establish that the claimed disability was employment related. She was thus not entitled to wage-loss compensation for the period claimed.

LEGAL PRECEDENT -- ISSUE 2

When an employee claims that, a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[15]

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.[16] The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[17] Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[18]

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to establish that the acceptance of her claim should be expanded to include the additional condition of left lateral epicondylitis causally related to the accepted August 9, 2017 employment injury.

On September 7, 2017 Dr. Varney diagnosed left lateral epicondylitis. He described the accepted August 9, 2017 employment injury of a fall down the stairs onto appellant's left elbow.

[13] *Id.*

[14] *V.H., supra* note 5.

[15] *Id.*

[16] *V.H., supra* note 5; *D.E.*, 58 ECAB 448 (2007); *Mary J. Summers*, 55 ECAB 730 (2004).

[17] *V.H., id.; I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (2005).

[18] *V.H., id.; V.W.*, 58 ECAB 428 (2007); *Ernest St. Pierre*, 51 ECAB 623 (2000).

However, Dr. Varney also noted that her work duties had changed such that she was required to repetitively lift carcasses with her left hand to perform inspections. He noted that he was not certain whether appellant's left elbow condition was due to her work duties or to her August 9, 2017 fall. The Board has held that medical opinions that are speculative or equivocal in character are of diminished probative value.[19] Dr. Varney offered two separate explanations for appellant's diagnosed left lateral epicondylitis. To be of probative medical value regarding causal relationship, a medical report must provide a reasoned opinion on whether the employment incident described caused or contributed to the diagnosed medical condition.[20] As Dr. Varney did not offer a clear opinion as to the cause of appellant's diagnosed left lateral epicondylitis, his reports are insufficiently rationalized to meet her burden to establish causal relationship between her diagnosed condition and her accepted employment injury.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.[21]

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish total disability from work commencing October 15, 2017 causally related to her accepted August 9, 2017 employment injuries. The Board further finds that she has not met her burden of proof to establish that acceptance of her claim should be expanded to include left lateral epicondylitis causally related to the accepted August 9, 2017 employment injury.

[19] *T.B.*, Docket No. 18-1694 (issued April 23, 2019); *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *Kathy A. Kelley*, 55 ECAB 206 (2004).

[20] *T.B., id.; J.S.*, Docket No. 17-1039 (issued October 6, 2017); *John W. Montoya*, 54 ECAB 306 (2003).

[21] The Board notes that the employing establishment issued a Form CA-16. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 15, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board